IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 48 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DESALBHAI VIRJIBHAI KOLI

Versus

STATE OF GUJARAT

Appearance:

MR PJ YAGNIK for Appellant

MR KG SHETH, APP for Respondent No. 1

CORAM : MR.JUSTICE M.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 01/04/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. The appellant came to be convicted by the learned Additional Sessions Judge, Surendranagar for the offence of murder by virtue of a judgment and order rendered in Sessions Case No.94 of 1992 on September 17th, 1993.

2. As per the prosecution case, complainant Baldev Shivabhai, son of Shivabhai Virjibhai was informed by Jikuben Kanubhai on 11th September, 1992 at about 7.30 p.m. that his father Shivabhai Virjibhai has been attacked and is lying in an injured condition. He, therefore, rushed to the place to find his father lying in an injured condition. According to the complainant, on being asked, his father Shivabhai informed him that his brother Deshalbhai Virjibhai, the present appellant, had caused the injury with an axe. The complainant, therefore, immediately took the deceased to the hospital at Limbdi wherefrom he was referred to Ahmedabad and on way to Ahmedabad, he expired. A complaint was lodged by Baldev Shivabhai to the police official who was on hospital duty at Limbdi. On the basis of that complaint, an offence was registered and investigated upon. On conclusion of the investigation, the evidence was found against the accused and, therefore, a chargesheet was filed in the Court of JMFC. The learned JMFC, Limbdi, after following the procedure, committed the case to the Court of Sessions and the case was registered as Sessions Case No.94 of 1992.

2.1 The learned Additional Sessions Judge framed charge against the accused appellant at Exh.2. The appellant pleaded not guilty to the charge and claimed to be tried.

2.2 Considering the evidence led by the prosecution, the learned Additional Sessions Judge came to the conclusion that the charge against the accused was proved. He, therefore, convicted him for the offence of murder of Shivabhai Virjibhai and sentenced him to undergo imprisonment for life.

3. Aggrieved by the said judgment and order, the present appeal is preferred.

4. Learned advocate Mr. P.J. Yagnik submitted that the only eye-witness to the incident Jikuben Kanubhai has not supported the prosecution case. The only evidence against the appellant is in the form of oral dying declaration claimed to have been made before the complainant Baldev Shivabhai. That oral dying declaration suffers from various weaknesses namely, the

place at which such dying declaration was given and lack of evidence regarding the condition of the deceased. He, therefore, urged that conviction cannot be founded on such scanty evidence. Mr. Yagnik submitted that it also transpires that the appellant had also sustained injuries. Besides this, only one blow was given to the deceased with the blunt portion of the axe and, therefore, the conviction, at the most, could have been recorded under Section 304 of I.P.C. and not under Section 302. He, therefore, urged that the appeal may be allowed in toto or in the alternative, it may be partly allowed by altering the conviction to one under Section 304 of I.P.C.

5. The appeal is opposed by learned Additional PP Mr. Sheth.

6. We have gone through the record and proceedings.

7. As rightly pointed out by Mr. Yagnik, the only eye-witness Jikuben Kanubhai (Exh.9) who informed the complainant Baldev Shivabhai about the incident has chosen not to support the prosecution case. She has been declared a hostile witness. As such, there is no direct evidence.

8. The only evidence that appears is in the form of oral dying declaration made by the deceased before the complainant Baldev Shivabhai (Exh.7). He, in his complaint, has stated that on learning about the incident through Jikuben, he rushed to the spot, found his father in an injured condition and, on enquiry, he was told by his father that the appellant had caused injuries to him. In deposition, however, he states that his father did not speak initially but after he was shifted to the house on a cot, he stated that the appellant had caused the injuries. The discrepancy is, therefore, regarding the place at which the oral dying declaration was given. We have closely scrutinised the deposition of Baldev Shivabhai (Exh.7). He has rectified his error after being refreshed about the memory by showing the complaint by the prosecution that the dying declaration was made at the place where the injured was found. In cross-examination, a question is put only regarding the fact that he had not stated in his complaint that the dying declaration was given while the deceased was lying on the cot. Barring this, there is no cross-examination and no challenge to the dying declaration.

9. There is nothing to indicate that there was any enmity between the deceased and the appellant who

happened to be brothers. There is nothing to indicate that there was any enmity between the complainant and the appellant and as such, no reasons are indicated to doubt the veracity of the deposition of complainant Baldev Shivabhai. Apart from this, the version implicating the appellant gets corroboration from the fact that the axe which was recovered from the appellant was found to carry blood of the same group as that of the deceased. This aspect closes the scope for any doubt in the prosecution case. We, therefore, do not find any reason to take a contrary view to the effect that the prosecution has not been able to establish involvement of the appellant in the offence.

10. As regards the alternative submission made by Mr. Yagnik about altering the conviction to one under Section 304 of I.P.C., it has to be observed that the case of the appellant throughout has been of a total denial. There is no material to indicate that the case may fall under any of the exceptions to place the case in the category of a culpable homicide not amounting to murder. That argument, therefore, cannot be accepted.

11. For the reasons stated hereinabove, we find no error to have been committed by the court below in recording conviction of the appellant for the murder of his brother Shivabhai Virjibhai and the appeal, therefore, must fail. The same is, therefore, dismissed.

(M.C. Patel, J.)

(A.L. Dave, J.)

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